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No. 80-1964

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

HOLIDAY MOBILE HOME RESORTS, INC. AND WILFRED O. DUNKEL,

Petitioners,

vs.

R. DIXON WOOD AND DON W. HEIPLE,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's request for a Writ of Certiorari is meritorious, and therefore Respondents are not entitled to damages pursuant to Supreme Court Rule 49.2.

At the time that Mr. Wilfred O. Dunkel invested his money in the faltering Holiday Mobile Home Resorts properties, it was clearly his intent, as testified at trial, to receive as security for his loans *all* properties which were either owned or administered by Holiday Mobile Home Resorts. This was clearly understood by all parties

concerned in the Federal Bankruptcy proceedings, and the Respondents did not at that time object to the use of Mr. Dunkel's money to salvage their partnership investment.

Therefore, when Mr. Dunkel loaned Holiday Mobile Home Resorts the sum of $1,250,000.00, it was clearly understood by all parties that he would receive liens on the corporate property, as well as the Holiday Isle property, as security for his loan. Apparently, the Court of Appeals of Arizona recognized this underlying intent, and gave Mr. Dunkel an equitable mortgage in the partnership property. It is Petitioners' claim that this attempt to in actuality sustain the Federal District Court's action of imposing a lien on partnership property under equity principles is an attempt to get around any technical legal problems inherent in the sematics of the Federal Court Order.

The Petitioners have no objection to the Court of Appeals placing an equitable mortgage on the partnership property; however, the fact such court went one step further and reduced Mr. Dunkel's interest on his money from the rate of 12% ordered by the Bankruptcy Court to 6%, clearly modifies the terms of the original Federal Court Order.

There was substantial evidence presented in the court below that all the parties privy to the original Federal District Court Order understood that the term "subsidiary" would naturally, include the Holiday Isle partnership property. Mr. Dunkel would not have consumated the transaction with the trustee had this property been excluded from the effect of his lien. For the Arizona Court of Appeals to now refuse to recognize this underlying intent by sidestepping Mr. Dunkel's entitlement purely on a legal definition, undermines the intent of the Federal Court's Order.

If the Court of Appeals is to tacitly recognize the existence and enforceability of the Federal Court Order by characterizing it as an equitable mortgage, then the Court of Appeals should also include the original interest provision provided by the Federal Court. By failing to recognize an interest provision that was deemed reasonable at the time of its making, and substituting an interest rate substantially lower, the Court of Appeals has collaterally attacked the Federal Court's Order.

In this regard, Petitioner's feel that their Petition is meritorious. Further,this Petition is not brought soley for the reason of delay. It should be pointed out to this court that Petitioner's Petition for Writ of Certiorari in no way has hindered or delayed the implementation of the Court of Appeals Order of appointment of Receiver, liquidation of assets, and sale of partnership property. These matters are presently proceeding without delay. In fact, the Maricopa County Superior Court has already appointed a Receiver, and he has taken charge of the property and is attempting to administer the property in accordance with the trial court's order. The parties have agreed to the appointment of an appraiser for purposes of sale of the property, and a Special Master has been appointed to handle the accounting required during the Receivership.

The only reason Petitioners have brought their Petition for Writ of Certiorari is because they justifiably feel that the Arizona Court of Appeals overstepped its bounds by reducing Mr. Dunkel's interest rate on a valid security instrument ordered by the Federal District Court, which thus constituted an attack upon a Federal Court Order.

In view of the foregoing, it is maintained that Respondent's request for damages pursuant to Supreme Court Rule 49.2, and double costs pursuant to Rule 50.7, should be denied.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

DALE R. SHUMWAY, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioners in this case, that on this **26th** day of June, 1981, he mailed three copies of the Petitioner's Reply to this cause by depositing the Reply in the United States mail, first class postage prepaid, to:

Mr. Philip Berelson
BROWN & BAIN, P.A.
222 North Central
Phoenix, AZ 85004

and that he also then mailed 40 copies of the Reply to the Clerk of this Court, first-class postage prepaid, which mailing took place on the 26th day of June, 1981, which was within the time permitted for filing this Reply, all in accordance with Supreme Court Rule 28.

DALE R. SHUMWAY

SUBSCRIBED AND SWORN to before me this **26th** day of June, 1981.

Notary Public

My Commission Expires:

My Commission Expires Feb. 1, 1985

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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